CHAI KAH SIM

v.

ISHAK SAAD

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[FEDERAL COURT CIVIL APPEAL NO. 244 OF 1984]
18 FEBRUARY 1986

TORT: *Road accident - Contributory negligence - Liability - Conflicting versions - Duty of trial Judge - Other evidence - Sketch plan, photographs, police reports - Point of impact - Inference from facts - Circumstantial evidence - Observation of witnesses - Whether trial Judge's finding should be upset.*

This appeal arose out of a road accident between the appellant who was the driver of the lorry and the respondent who was the motorcyclist. The accident occurred at the 24th milestone Kuala Kangsar/Ipoh main road on 10 September 1982. The High Court Judge in Ipoh found both parties equally to blame for the accident and accordingly assessed the damages at fifty per cent in favour of the motorcyclist. The appellant then appealed against that decision on the ground of liability only.

Held:

[1] Both parties gave contradictory and conflicting versions of the accident. However, the learned Judge applied the correct test by taking into consideration the other available evidence, that is, the sketch plan, photographs of the scene of the accident and police reports lodged by both parties to assist him in making his finding.

[2] The crucial issue was the point of impact between the two vehicles. Taking into consideration all relevant factors, the Court agreed with the learned Judge as to the point of impact.

[3] The learned Judge's inference from facts was based on circumstantial evidence both oral and documentary which are sufficient and conclusive as to entitle the learned Judge to make a proper inference.

[4] The learned Judge heard and saw the witnesses and was in a better position to determine their credibility and reliability. In the circumstances it is not proper for this appellate Court to upset his finding.

[Appeal dismissed with costs. Judgment of High Court confirmed. Deposit to respondent on account of taxed costs.]

For the appellant - Joga Singh Dhalliwal; M/s. V.P. Nathan & Partners
For the respondent - Jagdis Singh Sandu; M/s. Sandu & co.

JUDGMENT

Syed Agil Barakbah SCJ:

This is an appeal against the decision of High Court Judge sitting in Ipoh, in the State of Perak. The appellant was the driver of motor lorry AX 3516 which was involved in an accident with motorcycle AAF 7095 ridden by the respondent at the 24th milestone Kuala Kangsar/

Ipoh main road on 10 September 1982 at about 11.50 a.m. The learned Judge found both parties equally to blame for the accident and accordingly assessed the damages at fifty per cent in favour of the respondent/plaintiff. The appellant being dissatisfied appealed against the decision on liability only but not against the decision on the quantum of damages.

The undisputed facts as accepted by the trial Judge were that the two vehicles were negotiating a sharp corner along the road approaching each other from the opposite directions. The motorcycle was proceeding from Kuala Kangsar towards Ipoh and the lorry was travelling from Ipoh towards Kuala Kangsar. The respondent was negotiating a left-hand bend and the appellant a right-hand bend when the accident occurred. Immediately after the collision, the lorry came to a stop over the left edge of its side of the road facing towards Kuala Kangsar. The motorcycle was lying in the middle of the road facing towards Kuala Kangsar. The motorcycle was lying in the middle of the road across the centre white line. Its front wheel and part of its body occupied its side of the road while the other half occupied the lorry's side of the road.

The parties gave conflicting versions of the manner in which the accident occurred as noted by the trial Judge. According to the respondent, he was riding his motorcycle about two feet from the left edge of the road and while negotiating the bend he collided against the rear off-side wheel of the oncoming lorry. After that, he could not remember anything else. On the other hand, the appellant testified when approaching the bend he saw the respondent coming straight at his lorry. He tried to swerve to the left to avoid a collision but the respondent's motorcycle collided against the front of the rear off-side tyre of the lorry. In the light of the contradictory versions, the learned Judge took into consideration the other available evidence, viz. the sketch plan and photographs of the scene showing the positions of the two vehicles after the accident and the police reports lodged by both parties to assist him in making his finding. In our view, he has applied the correct test.

It is common ground that the front part of the motorcycle collided with the rear off-side tyre of the motor lorry when the two vehicles were negotiating the sharp bend. The learned Judge also accepted the appellant's evidence that as a result the motorcycle bounced back and fell on the road.

The crucial issue was the point of impact between the two vehicles. The appellant's contention was that it happened on his side of the road somewhere at point 'D' on the sketch plan. The respondent claimed the collision occurred on his side of the road. The learned Judge however was of the view that the point of impact was somewhere near the centre of the road and not far from the place where the motorcycle was found lying on the road. He stated in his grounds:

> The lorry was therefore somewhere near the centre of the road when the collision occurred. It could not be near the edge of the road as stated by the defendant. In my view having regards to the position of the lorry it is probable that the defendant was cutting across the corner as he took the right-hand bend. The collision occurred when his lorry was at an angle to the centre of the road and the front was facing diagonally to the left. The rear of the lorry was still at the centre of the road when the collision occurred.

It was submitted by the learned Counsel for the appellant that the learned Judge erred in arriving at that conclusion on the ground that he had embarked upon a course of speculation as to how the collision occurred and that led him to conclude that the point of impact was somewhere near the centre of the road not far from the motorcycle and not on the appellant's side of the road at point 'D' in the sketch plan.

With regard to the latter, the sketch plan shows point 'D' as a fresh scratch mark which is about 4 feet 8 inches away from the centre white line. The length of the scratch mark has not been given. However the distance from 'D' to 'E', the rear wheel of the motorcycle lying in the centre of the road is about 35 feet. The learned Judge took these into consideration and concluded that point 'D' was too far away from the motorcycle and could not be the point of impact. Although he did not say in so many words, the Judge's conclusion is substantiated by other material factors. Firstly, the scratch mark 'D' could not have been made by any part of the motorcycle during the collision because according to the appellant's own testimony his lorry did not drag the motorcycle after the impact. Secondly, the motorcycle collided with the front part of the rear off-side wheel of the lorry, bounced back and fell on the road. If both the motorcycle and the respondent had been flung about 35 feet away, the result would have been disastrous. There would have been more damage to the motorcycle and more serious injuries to the respondent. The damage to the motorcycle as shown in the photo was mainly to the front part including the wheel which appeared to have buckled. There appeared to be no tell-tale mark on the off-side rear wheel of the lorry and for that matter on any other part. With regard to the respondent's injuries, the medical reports which were included in the agreed bundle of documents had not been filed in the appeal record. However, it was not disputed that the 65-year-old respondent suffered from a dislocated shoulder and other injuries including inability to grip with his left hand. After the accident, he had to use a stick to walk for some time. We are also satisfied that the impact between the vehicles as indicated by the trial Judge was slight and not a direct and strong impact since it was probable in the circumstances of the case that both vehicles had slowed down in order to negotiate the sharp bend. The distance from the point of impact to the place where the motorcycle and the respondent had fallen in the centre of the road as seen by the appellant, could not therefore be very far. After all, the distance between the heavily loaded lorry and the motorcycle on the road after the accident as shown in the sketch plan is only about 7 feet 1 inch. (See 'E' to 'F' on page 39 of the Appeal Record). Thirdly, there were no debris along the line but were near the motorcycle as seen from one of the photographs. Lastly, if at all the accident occurred on the appellant's side of the road, it could not be at point 'D' but somewhere before the starting of point 'D' slightly further inside the appellant's part of the road. That, in our view, is most improbable. With respect, therefore, we agree with the learned Judge that the point of impact could not be at point 'D' or any where near it on the appellant's side of the road.

Taking the above into consideration, we do not think that the trial Judge has embarked upon a course of speculation when he concluded that the lorry probably cut across the corner in taking the right-hand bend and the collision occurred when it was diagonally across the centre of the road. Although it was an inference from the facts, it was based on circumstantial evidence both oral and documentary which, in our considered judgment, are sufficient and conclusive as to entitle the learned Judge to make a proper inference. It was in the circumstances the only reasonable and irresistible inference. He heard and saw the witnesses and was in a better position to determine their credibility and reliability.

The appellant was cross-examined on the matter in his presence. He had made proper use of that advantage in considering the evidence as adduced. In the circumstances, it is not proper for us to upset his finding. We agree with him that the respondent in the Court below had proven that the accident was caused to some extent by the fault of the appellant.

We therefore dismiss the appeal with costs and confirm the judgment of the Court below.

Deposit to the respondent on account of taxed costs.

Also found at [1986] 1 CLJ 537